PUBLIC PROSECUTOR

v.

ARASAD ASAMLE

HIGH COURT BORNEO, TAWAU
ABU MANSOR ALI J
[CRIMINAL TRIAL NO. 22 OF 1984]
22 AUGUST 1986

CRIMINAL LAW: *Trafficking in dangerous drugs - Presumptions under the Dangerous Drugs Act 1952 - Sections 37(da), 38 - Rebutting of presumptions - Section 39B(1)(a), 39B(2) - Mandatory sentence of death.*

The accused was charged under s. 39B(1)(a) read with s. 39B(2) of the Dangerous Drugs Act 1952, with trafficking in 208.12 grammes of cannabis. The prosecution case disclosed that the accused when accosted by a police party who lay in ambush, threw away a bag he was carrying. The bag when examined was found to contain among other things 208.12 grammes of cannabis. A prosecution witness testified that he had seen the bag in question in the possession of the accused and that the accused had in fact paid him RM10 to fetch it from a neighbours house. The accused denied the charge and maintained that he had been framed. According to him the bag was in the possession of someone else whom he saw throw the bag away after the police arrested the accused.

Held:

[1] Without invoking the presumptions under the Dangerous Drugs Act 1952 there was a *prima facie* case as the accused had possession, and also knowledge of the nature of the thing possessed, as evidenced by his act of throwing it away when caught. Under s. 38(d) he was deemed to have been in possession and to have known the nature of the drug. Under s. 37(da) he was also presumed to be trafficking in the dangerous drug as the quantity of cannabis was more than 200 grammes.

[2] The question before the Court was whether the accused rebutted both presumptions against him. Could his story be reasonably true even though the Court did not believe in its truth? The story of the accused was a mere denial in the face of the prosecution evidence accepted by the Court that the accused was in possession of the offending exhibits. The arresting policemen were not cross-examined to lay the foundation for the defence version. The accused's story could not be reasonably true. A denial was no defence. The accused had not rebutted both presumptions raised against him and was guilty.

[3] Although the quantity in the accused's possession was only 8 grammes in excess of the quantity attracting the mandatory capital penalty, the accused was sentenced to death by hanging.

Case referred to:
D.A. Duncan v. PP [1980] 2 MLJ 195

Legislation referred to:
Dangerous Drugs Act 1952, ss. 37(da), 37(d), 39B(1)(a)

For the DPP - Abdul Ghani Patail; Jabatan Peguam Negara, Cawangan Sabah
For the accused - Simon Pang Yau Wing; M/s. Simon Pang & Co.

JUDGMENT

Abu Mansor Ali J:

The accused was convicted and sentenced to death for trafficking in dangerous drugs to wit cannabis at the High Court, Tawau, Sabah, on 22 August 1986 on a charge as follows:

> That you on 9 May 1984 at about 2.55 p.m. at Kedai Kopi Yong Min Lan, Kg. Titingan, in the district of Tawau, in the State of Sabah, did traffic in dangerous drugs, to wit, 208.12 grammes of cannabis on your own behalf and that you have thereby contravened s. 39B(1)(a) of the Dangerous Drugs Act 1952 (Revised 1980) (Act 234) and punishable under s. 39B(2) of the said Act.

The facts of the case as disclosed by the prosecution witnesses Insp. Gan Tong Ki (PW2), Dtv. Cpl. Gusibih bin Ladat (PW4), Dtv. Cpl. Ismail bin Jinali (PW5) and Const. Ligi Limar (PW6) were that on 9 May 1984 at about 2.00 p.m. or so they waited in ambush in a coffee shop Yong Min Lan in Kg. Titingan (Kg. Ice Box), Tawau, after information received that there would be disposal of cannabis by a male Filipino. About 30 minutes or so later they spotted the accused carrying a blue plastic bag. As soon as the accused entered the shop they arrested him. He threw away the bag. He was handcuffed. PW2 examined the plastic bag in front of accused and inside there a few bananas, a packet wrapped up in newspapers, brown paper, and inside it were dried leaves believed by the police to be cannabis. They took the accused and the exhibit to the Tawau Police Station. PW2 and PW4 had the exhibit weighted and it was 225 grammes. The prosecution called the chemist (PW1) who testified that the dried vegetable matter was possible cannabis as defined under the Dangerous Drugs Act 1952 and it weighed 208.12 grammes. It was also disclosed by the prosecution witness, John Lagayau (PW3), that shortly before accused's arrest he saw the blue plastic bag in the accused's possession before he boarded a vehicle after he asked PW3 to fetch it on payment of RM10 from a neighbour's house, a move designed to implicate PW3 in case he should be caught with it.

The Court believed and accepted the prosecution evidence and it held that the accused was found in possession of the offending cannabis. Without invoking the presumptions under the Dangerous Drugs Act 1952 there was *prima facie* case in that the accused had possession and he knew the nature of the thing possessed by his throwing away of the bag when he was caught. With the presumptions under s. 37(d) that he is deemed to have been in possession had to have known the nature of the drug. Apart from that and under s. 37(da) of the Act he is also presumed to be trafficking in that dangerous drug as the quantity of the cannabis was more than 200 grammes.

The accused was called to enter his defence and he gave evidence on oath. His defence was a bare denial that he was arrested with the offending exhibit. He was, according to the sum total of defence evidence, framed up and made to take the wrap although it was not found on his person but found in a corner of the coffee shop and he was arrested. Briefly his defence was the plastic bag was carried by a fellow taxi passenger, a Bugis man. He said that John Lagayau (PW3), had given it to the Bugis man before he and the accused boarded that taxi. Shortly after this the Bugis man then asked for his favour to help convey to PW3 some money belonging to PW3 in the possession of the Bugis man to which the accused agreed. At the end of that taxi ride the Bugis man invited him to have a drink at the same coffee shop to which he also agreed. As he wanted to ease himself, he said he stopped a few yards before the coffee shop and the Bugis man proceeded to the coffee shop. As soon

as he entered the coffee shop he was arrested by the police officers and then he saw the Bugis man run away leaving the plastic bag in the corner of the shop. That way he was made to take the wrap.

The question before the Court was has the accused rebutted both presumptions raised against him? Could his story be reasonably true even though the Court does not believe in its truth? His burden was a light one. The Court found that the story of the accused is a mere denial in the face of the prosecution evidence accepted by the Court that the accused was in possession of the offending exhibits. The arresting police personnel were not at all cross-examined to lay the foundation of the defence story that he was arrested without the offending exhibit thus strengthening their evidence. The accused's story could not reasonably be true as, if it was true that the accused walked in without carrying anything and the police arrested him, the police would have blown off their cover and made futile and a waste of time their intended ambush of that day. That as alleged by the accused they would not do as they went there to the coffee shop for a specific purpose of laying in wait. A denial is no defence. (See *D.A. Duncan v. PP* [1980] 2 MLJ 195).

The Court therefore rule that the accused had not rebutted both the presumptions raised against him. He was found guilty and convicted. Although the excess to statutory trafficking was only 8 grammes and although the Court heard the Counsel's plea in mitigation the Court had no alternative but to sentence him to death by hanging, the only sentence provided under the law.

Also found at [1988] 2 CLJ 323